

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 1038 of 1997****For Approval and Signature:****HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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STATE OF GUJARAT - Appellant**Versus****CHIMANBHAI SHANABHAI BARAIYA - Respondent**

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Appearance :

MR. M.A. PATEL, LD. APP for Appellant:

MS KHYATI P HATHI for Respondent:

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**Date : 23/11/2006****ORAL JUDGMENT**

1. Heard Shri. M.A. Patel, learned APP for the
appellant State of Gujarat and Ms. Khyati P.
Hathi, learned counsel for the respondent /

original accused.

2. The appellant State of Gujarat has preferred this appeal under Section 378 of the Code of Criminal Procedure, 1973 (herein after referred to as the "Code" for brevity), challenging the order of acquittal dated 18/9/1997 passed by learned Chief Judicial Magistrate, Nadiad in Criminal Case No. 705 of 1992, acquitting the respondent of the charge of committing offence under section 221, 222, 223, 225, 225-A, 323 and 506(2) of I.P. Code.
3. This Court (Coram: M.S. Parikh, J) granted leave and admitted the appeal on 16/2/1998. The same has come up for final disposal today.
4. The case of the prosecution and the appellant deserve to be set out as under.

The Superintendent, Nadiad Remand Home, lodged the complaint with Nadiad police station that accused while discharging his duty as watchman, remand home, helped the juvenile inmates in running away and did not bother to nab them, and also induced them to run away from the remand home on false and ill-founded stories about mental torture, ill-treatment from the Superintendent of the remand home. On 5/6-12-1991, six juvenile inmates of remand home had run away after breaking open and removing the

grill of latrine of remand home and the one who could not get out of the gap from the windows of latrine was helped to ran away by giving him keys of lock applied on the gate. The first information came to be registered as FIR no. 551 of 1991 and offence under section 221, 222, 223, 225, 225-A, 323 and 506 (2) came to be registered against the accused. After investigation the police filed charge sheet on 3/2/1992. The accused was summoned. The charge sheet at exhibit-4 was read over to him. He pleaded not guilty, and claimed to be tried. The trial court recorded evidence of the prosecution witnesses and put the same before the accused. Accused's statement under section 313 of the Code came to be recorded and after hearing the counsels and looking at the record came to the conclusion that, the prosecution had failed in proving guilt on the part of the accused so as to bring home charges levelled against him. The order of acquittal order dated 18/09/1997 is impugned in the present appeal.

5. Shri. Patel, learned APP has vehemently submitted that the trial court has patently erred in acquitting the accused. The trial court ought to have appreciated the fact that the accused was incharge and on duty of guarding the remand home and its inmates. The incident of breaking open the grill and running away by the inmates happened during the duty hours of the

accused. The witnesses have supported this version of the prosecution. The none examining of children who had attempted to ran away can not be considered to be fatal to the case of the prosecution. Shri. Patel has submitted that the charges are those of dereliction in duty and helping and enticing the inmates to ran away from remand home and, therefore, looking to the record the decision of the trial court deserve to be quashed and set aside and as it appears from the record the accused had committed offence, he deserved to be punished.

6. Ms. Khyati Hathi, learned counsel appearing for the respondent accused has submitted that this being an acquittal appeal, unless & until it is demonstrated by the appellant that the reasoning and findings of the trial court are so perverse and has resulted into miscarriage of justice the acquittal order need not be disturbed. Ms. Hathi has further submitted that, even if a second view is plausible and canvassed on the facts & circumstances of the case, then also the view taken by the trial court, based on such second view the order of acquittal can not be disturbed in acquittal appeal under section 378 of the Criminal Procedure Code. Ms. Hathi has further submitted that the case of the prosecution has not been entirely supported by the witnesses. In absence of relevant documentary evidence showing the inmates and even in absence of

seeing statement recorded by investigating agency that two inmates who were nabbed and brought back, it can well be said that the prosecution has failed in establishing charge against the accused. Ms. Hathi has drawn this Court's attention to the testimony of PW-2 Babarbhai Zalabhai, at exh. 17, who has not supported the case of the prosecution and he has not been declared hostile by the prosecution. The P.W. Mohanlal Atumal whose testimony is at exhibit-18 has also not supported the case of the prosecution. Similarly, testimony of Hardeners Antibiotic, PW-4, whose testimony is at exhibit-20 also can not be said to have been in any way helpful to the case of the prosecution. PW-5 Unambiguity Fulani's has also not completely supporting case of the prosecution as could be seen from his testimony recorded at exhibit-21. P.W-6 Subharmonic Available, eh. 22, has also not supported the panchromatic nor has he been declared hostile. Therefore, it is submitted by Ms. Cathi that the order impugned deserve to be upheld.

7. This Court has perused records & proceedings and heard learned counsels of the parties at length. On perusal of the record and submission of learned counsels, it appears that the prosecution has not proved the case beyond reasonable doubt. The glaring infirmity in the prosecution case deserves to be viewed in its

proper perspective. The case of the complainant is that the accused had not only induced seven of the inmates in running away from remand home on account of so called mental torture and harassment and he had in fact facilitated escape of one inmate who was physically challenged and who was also brought back from the railway station along with another inmate. The investigation agency has yet recorded even their statements nor have they been brought as witness before the court. There is no explanation as to why their statements could not be recorded by investigating agency. Shir. Patel, learned APP has lamely tried to explain their absence in the court as witness as their tenure was short-while in the remand home.

8. Shri. Patel has also explained in response to Ms. Hathi's submission that sanction was not valid as it was not granted by the concerned authority competent to grant sanction. Shir. Patel has submitted that the Secretary, Home, is the disciplinary authority and he has validly granted sanction. Be that as it may; without going into that question of sanction this appeal deserves to be disposed of on the ground of glaring infirmity in the case of the prosecution as it is stated herein above. The prosecution witnesses who have not supported case of the prosecution and who have not been declared hostile have not in any way supported the

version of the complainant. In view of this, looking to their version and the version of the prosecution, this Court is of the view that the order of judgment of acquittal impugned in the present appeal does not call for any interference.

9.This being an acquittal appeal the order of acquittal need not be disturbed and interfered with unless & until it is aptly demonstrated by the appellant that the same was perverse and has resulted into miscarriage of justice.

10.In view of the aforesaid discussions, this Court is of the view that the order impugned can not in any way said to be perverse, rather the same is just & proper and therefore, it does not call for any interference. In the result, this Court is of the view that the impugned judgment & order of acquittal need not be disturbed. The appeal therefore deserves to be dismissed and accordingly it is dismissed. Bailable warrant stands canceled.

[S.R. BRAHMBHATT, J]

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